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No. 91-1903

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EDWARD CRESSWELL; AGRICONSULTANTS INCORPORATED; AMERICAN GROWTH PROPERTIES MANAGEMENT COMPANY LTD.; ERIC APPLETON; BERFORS FINANCE LTD.; JOHN BIRD; NORA BIRD; PETER BURKHARDT; JOHN A. L. CHETTOE; DENNIS R. DUDENEY; V.S. DWIVEDI; LARS FEUK; FLETCHER INVESTMENTS LTD.; JOHN H. FLETCHER; NOEL FOX; STUART J. GARDINER; F. GEORGE; KENNETH E. F. GEORGE; VERITY ANNE GIBBONS; POLLY GREGORY; A. D. HARRIS; DAVID G. HART; JOHN M. HAWKINS; PATRICIA HAWKINS; SPENCER HAYES; HILARY CORPORATION, INC.; ANTHONY HYDE; IZRADA, S.A.; GORDON WALTER JAMES; JOVAL INVESTMENTS LTD.; JAD KABBAN; ESTATE OF PHILIP J. KNIGHT; PIERRE LaMARCHE; ROGER LANDAU; ANDREW LEWIS; JAMES J. MATHER; MALCOLM MILTON; GREGOIRE MOZOYNIEWICZ; COLLIN DAVID PARKER; PEZCO OVERSEAS, INC.; JOHN PIRIE; A. REMINI; JULIA A. ROBIN; ROGER Y. ROBIN; CLAUDINE SEIKALY; JOHN B. SHAW; ROBERT W. SHIELDS; SIANPLAN LIMITED; REGINALD E. SILLETTO; BASILIA L.W. ABEL SMITH; DAVID F. SMITH; ALEC SNOBEL; GEOFFREY W. SUTCLIFFE; JAN WALLIN; PATRICIA WILKINSON, as Executrix, and GORDON WILSON,

Petitioners,

—v.—

SULLIVAN & CROMWELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals properly affirm the District Court's exercise of its equitable discretion to dismiss Petitioners-plaintiffs' claim that they were fraudulently induced to settle a prior action by the non-production of certain documents, when their counsel in that prior action knew of the non-production and failed to take any steps to obtain the documents?

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STATEMENT OF THE CASE

Petitioners, the plaintiffs in this action, seek review of a summary order of the United States Court of Appeals for the Second Circuit, on an issue that was not even discussed in the Court of Appeals' ruling. The Petition presents no "special and important" reasons justifying the issuance of a Writ of Certiorari. Supreme Court of the United States Rule 10.1.

Petitioners sought in this action to improve upon a $2.87 million settlement of a prior action, *Cresswell, et al.* v. *Bache Halsey Stuart Shields Inc.*, 83 Civ. 2099 (S.D.N.Y.) (RWS) ("*Cresswell I*"). Petitioners claimed to be entitled to an additional recovery because certain documents had not been produced in discovery in *Cresswell I* by the defendant therein, Prudential-Bache Securities, Inc. ("Prudential-Bache"), and by its *Cresswell I* counsel, Sullivan & Cromwell. In particular, Petitioners contended that the non-production of documents concerning (i) a New York Stock Exchange investigation of certain "Spread" transactions*, and (ii) a Prudential-Bache customer's complaint to the Exchange relating to her own "Spread" transactions, was fraudulent.

These claims of fraud are, and have always been, spurious. As to the first category of documents, when Sullivan & Cromwell responded in December 1983 to Petitioners' *Cresswell I* document request, Prudential-Bache had in its possession two letters reflecting that it had just been notified by the Exchange of an investigation into the Spreads. The District Court found that there was "no evidence" that Sullivan & Cromwell knew of those two letters until after *Cresswell I* was settled (Pet. App. 98a).**

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* The "Spread" transactions were investments based upon the spread between the price of GNMA futures contracts and the price of Treasury Bond futures contracts. The marketing of the "Spreads" by Prudential-Bache was at issue in *Cresswell I*.

** References to "Pet. _____" are to the Petition. References to "Pet. App. _____" are to the Appendix to the Petition.

The second category of documents reflected not an investigation *by* the Exchange but an attempt by a Prudential-Bache customer, Polly Gregory, to involve the Exchange in her effort to recoup losses from her Spread transactions. These "Polly Gregory documents"—which antedated the Exchange investigation—were not produced in response to Petitioners' document request on the basis of a judgment by Marvin Schwartz, a senior litigation partner at Sullivan & Cromwell, that they did not relate to an "investigation or inquiry" by the Exchange within the meaning of that request. Schwartz, who had many years of experience representing clients before the Exchange, interpreted that request as seeking documents relating to "investigations or something like an investigation which has the potential for leading to a disciplinary charge" (Pet. App. 72a). Such an investigation would be conducted by the Exchange Department of Enforcement, not by the Division of Member Firm Regulatory Services which was handling Gregory's complaint. Schwartz believed that the chances were extremely remote that a customer complaint would lead to such an investigation—an analysis confirmed in testimony by the Exchange employee who handled the Gregory complaint (Pet. App. 71a).

While Petitioners' Statement of the Case attempts (through selective and out-of-context quotations) to create the impression that the Polly Gregory documents were hidden from Petitioners' attorney, Edward Swan, during and after *Cresswell I*, in fact Swan had several of those documents in his possession during that action; four of them had been pointedly *shown to him* by a Sullivan & Cromwell attorney at a deposition of Ms. Gregory.* Moreover, both the Court of Appeals and the District Court expressly recognized that Swan "had actual knowledge that not all of the documents

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* Ms. Gregory joined as a plaintiff in *Cresswell I* in January 1984 and was thereafter deposed by a Sullivan & Cromwell attorney. Swan represented her at the deposition. The Sullivan & Cromwell attorney showed Gregory, and questioned her about, four of the "Polly Gregory documents" and noted on the deposition record: "Just so you are not misled, some of these copies I have shown you today have come from the files of Bache and not from your files" (*see* Pet. App. 53a).

he thought he had called for had been produced," "had available obvious means for determining whether there were other such documents or other information of which he was unaware," but "made no effort whatever to follow up or inquire" (Pet. App. 53a, 108a-111a).

Notwithstanding his "actual knowledge" of the Gregory documents, Swan did not ask Sullivan & Cromwell why they had not been produced in discovery or if others existed; did not renew his document request; did not depose the Prudential-Bache employee he knew had communicated with the Exchange; did not contact the Exchange (or the Chicago Board of Trade which Swan knew was investigating the Spreads); and did not discuss the activities of regulatory bodies with his clients or his associate (Pet. App. 109a). Indeed, when Polly Gregory joined as a *Cresswell I* plaintiff, Swan did not ask Prudential-Bache to produce her customer file as he had for all original plaintiffs (*id.*). Had he done so, there would have been no issue concerning the responsiveness of the Gregory/Exchange correspondence.

In light of these undisputed facts, in January 1989 the District Court granted summary judgment dismissing this action, which had been styled by Petitioners as a common-law fraud (not "fraud on the court") case, holding that "plaintiffs fail to raise a triable issue of fact with respect to the required element of reliance" (Pet. App. 108a).* Petitioners appealed. The Second Circuit, while stating its inclination to affirm on the merits, found that the action was "an attack on the *Cresswell I* judgment," and thus "committed to the court's discretion, informed by traditional equitable principles" and remanded so that the District Court could consider the case as a court of equity (Pet. App. 53a, 51a, 54a, 55a).

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* The District Court's opinion also invalidated, as violative of the Code of Professional Responsibility, a fee arrangement pursuant to which Petitioners' present counsel agreed to pay Swan—Petitioners' key fact witness—a fee contingent on the outcome of this action (Pet. App. 77a-94a). The District Court disqualified Swan from acting as counsel for Petitioners in this action and the Second Circuit affirmed (*id.*; Pet. App. 56a-58a).

On remand, the District Court granted defendant's renewed motion for summary judgment, holding that a "new" Swan affidavit was insufficient "to overcome the conclusions which this Court drew in the original grant of summary judgment that Swan had adequate knowledge and opportunity to uncover any wrongdoing on S&C's part, and that his failure to do so constitutes a basis for denying Plaintiffs their requested relief" (Pet. App. 25a-26a). The Second Circuit affirmed on February 25, 1992 (Pet. App. 1a-8a).

REASONS FOR DENYING THE WRIT

This is a particularly inappropriate case for the grant of a Writ of Certiorari. It was decided by the Court of Appeals by summary order, a procedure used when "each judge of the panel believes that no jurisprudential purpose would be served by a written opinion." Second Circuit Rules Relating to the Organization of the Court § 0.23.* The unreported written statement appended to the summary order—which "shall not be cited or otherwise used in unrelated cases" (*id.*)—did not even discuss the issue upon which Petitioners seek review by this Court.** The Second Circuit's ruling did not pronounce a principle of general applicability, but rather affirmed an exercise of the District Court's "equitable powers" and "discretion" that turned upon detailed factual findings made in a previous ruling (Pet. App. 54a-55a, 25a-26a, 60a-78a, 108a-109a).

A Writ of Certiorari is unwarranted for the further reason that, contrary to Petitioners' assertion, the Second Circuit's decision does not conflict with this Court's decision in *Hazel-*

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* Section 0.23 of the Second Circuit Rules is reproduced in the Appendix hereto.

** The order and appended written statement of the Court of Appeals as reproduced in the appendix to the Petition (1a-8a) omits the Court's notation which appeared on the original decision: "N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT."

Atlas Glass Co. v. *Hartford-Empire Co.*, 322 U.S. 238 (1944) or any other precedent.

In *Hazel-Atlas*, this Court found that there had been "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals" through fabrication of a scientific article. 322 U.S. at 245. That fabricated article was relied on, and indeed "[q]uot[ed] copiously" by, the Third Circuit in rendering a decision. *Id.* at 241. This Court, among other things, vacated a judgment which had been entered in favor of the party which had acted fraudulently.

Contrary to Petitioners' contention, *Hazel-Atlas*—which involved egregious conduct unlike anything alleged herein—did not pronounce a rule that a court is precluded, in exercising its equitable discretion, from considering the plaintiff's lack of diligence if the plaintiff claims "fraud on the court." Indeed, in *Hazel-Atlas*, this Court stated that it could not "easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud." 322 U.S. at 246. *Hazel-Atlas* was thus fundamentally different from the instant action in which Swan's lack of diligence has been clearly established.

Further, *Cresswell I* was settled by agreement among the parties. In sharp contrast to *Hazel-Atlas*, no court was misled in *Cresswell I*. Indeed, the District Court's only involvement in the *Cresswell I* settlement was to "so-order" a stipulation of dismissal. Any "fraud" was thus not "on the court."*

In *Martina Theatre Corp.* v. *Schine Chain Theatres, Inc.*, 278 F.2d 798 (2d Cir. 1960), the Court of Appeals held that a purported fraud on a party resulting in a stipulation of settlement "so ordered" by the Court did not rise to the level of "fraud on the court." 278 F.2d at 801. In that case, Judge

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* Petitioners state that the Court of Appeals viewed this as a "fraud on the court" case (Pet. 9). This is simply incorrect. The Court of Appeals referred to one "fraud on the court" precedent as an "example" in discussing a jurisdictional issue (not raised in the Petition), but plainly did not rule that this case falls in that category (Pet. App. 52a, 24a).

Friendly distinguished *Hazel-Atlas* as having involved "a judgment in a patent case that may have been entered in reliance" on a fabricated article, reasoning that:

> [n]othing of that sort is before us now. When the parties moved for a dismissal of the treble damage suit with prejudice pursuant to stipulation, the district court had no duty to ascertain whether the settlement conformed with the antitrust laws in general or with the consent decree in particular; it sufficed for the court to know the parties had decided to settle, without inquiring why (278 F.2d at 801).

Thus, in *Martina Theatre*, Judge Friendly adopted the view that "fraud upon the court should be defined to exclude at least that type of improper conduct which induces a party to consent to a judgment, since such conduct does not directly induce action by a court." Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 Harv. L. Rev. 1314, 1327 (1959) (cited with approval in *Martina Theatre*, 278 F.2d at 801); *accord*, *Pfotzer* v. *Amercoat Corp.*, 548 F.2d 51, 52 (2d Cir. 1977).*

Hazel-Atlas is not in conflict with the decision below for the further reason that *Hazel-Atlas* was a patent case and thus did "not concern only private parties." 322 U.S. at 246. This Court placed reliance on this factor, stating in its *Hazel-Atlas* opinion that "[t]here are issues of great moment to the public in a patent suit." *Id.* These public policy considerations were absent in *Cresswell I*.

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* The conclusion compelled by *Martina Theatre* that this is not a "fraud on the court" case is reinforced by the very decisions within the Second Circuit that Petitioners claim to be contrary to the ruling herein. *Gleason* v. *Jandrucko*, 860 F.2d 556, 558 (2d Cir. 1988) held that nondisclosure during pre-trial discovery is not, by itself, fraud on the court. And *Kupferman* v. *Consolidated Research & Manufacturing Corp.*, 459 F.2d 1072, 1078-81 (2d Cir. 1972), in which an attorney's failure to disclose material information at trial was held *not* to constitute "fraud on the court," makes clear that involvement by an attorney does not necessarily convert the claim to one for "fraud on the court" (*see* Pet. App. 23a).

Even if this action were properly labelled as one for "fraud on the court," the decision below was correct because "Swan had adequate knowledge and opportunity to uncover any wrongdoing" (Pet. App. 26a). This test was applied in *Gleason* v. *Jandrucko*, 860 F.2d 556, 560 (2d Cir. 1988), which rejected a claim for "fraud on the court" based upon alleged withholding of evidence and perjury, since "the plaintiff had ample opportunity in the prior proceeding to uncover the alleged fraud." Other decisions in and outside of the Second Circuit involving claims of withheld information are in accord. *See, e.g., M.W. Zack Metal Co.* v. *International Navigation Corp.*, 675 F.2d 525, 529-30 (2d Cir.), *cert. denied*, 459 U.S. 1037 (1982); *USM Corp.* v. *SPS Technologies, Inc.*, 694 F.2d 505, 509 (7th Cir. 1982), *cert. denied*, 462 U.S. 1107 (1983).

Petitioners have attempted to manufacture a conflict between decisions of the Second Circuit and those of other circuits. There is no such conflict. No circuit court decision relied upon by Petitioners permitted a plaintiff to succeed on his fraud claim when his own failure to act diligently caused or contributed to his failure to obtain discovery materials. None involved a settlement stipulation; all involved court rulings or jury verdicts tainted by fraud or submission of fabricated evidence to a court.* And none holds that an attorney's

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* *See, e.g., In re Intermagnetics America, Inc.*, 926 F.2d 912 (9th Cir. 1991) (permitting independent action to rescind an *ex parte* bankruptcy court order entered upon false representations to the court); *Aoude* v. *Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (fabricated evidence submitted to court as part of complaint; unlike instant case, conduct found to have "plainly hindered defendant's ability to prepare and present its case"); *Virgin Islands Housing Auth.* v. *David*, 823 F.2d 764 (3d Cir. 1987) (reversing a dismissal premised upon an attorney's false representation); *Averbach* v. *Rival Mfg. Co.*, 809 F.2d 1016 (3d Cir.) (reversing dismissal of claim for relief from a tainted jury verdict), *cert. denied*, 484 U.S. 822 (1987); *Rozier* v. *Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978) (reversing denial of a new trial based on fraudulently withheld evidence); *H. K. Porter Co., Inc.* v. *Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1122 (6th Cir. 1976) (holding that there was *no* "fraud on the court" in connection with a patent ruling; noting that, as in the instant case, District Court that found no "fraud on the court" was "in the best position to know").

participation *ipso facto* converts ordinary fraud to "fraud on the court" or entitles a plaintiff to recover even when he failed to act diligently.

Indeed, Petitioners rely upon authority which squarely contradicts their position. In *Cleveland Demolition Co.* v. *Azcon Scrap Corp.*, 827 F.2d 984, 987 (4th Cir. 1987), the Court of Appeals rejected a "fraud on the court" claim, in part because the party asserting that claim had been "on notice" of, yet had failed to investigate, the alleged fraud prior to judgment. The Court held, in words applicable here, that "[h]aving failed to depose Dun & Bradstreet in time for the trial, Cleveland cannot avoid the verdict by leveling a charge of fraud on the court." *Id. See also Porcelli* v. *Joseph Schlitz Brewing Company*, 78 F.R.D. 499, 501 (E.D. Wis.) (plaintiff "must also satisfy the Court that he has substantial evidence of fraud which was not obtainable by due diligence prior to the time of entry of the order"), *aff'd*, 588 F.2d 838 (7th Cir. 1978); *In re Lawler*, 50 B.R. 110, 116 (Bankr. N.D. Tex. 1985).

Finally, it is unclear that this Court would ever reach the merits if it chose to consider this case. The Court would first have to address the question whether Petitioners have waived the "fraud on the court" argument.

From its outset, Petitioners alleged that this case was for common-law fraud (Pet. App. 49a); they raised the "fraud on the court" issue only after summary judgment had been granted against them. Petitioners stated below that they had failed to raise the issue on their initial appeal to the Second Circuit, asserting upon the second appeal that "whether diligence is required in an action based on fraud on the court—a question *not briefed* on the prior appeal—was never considered" (Petitioners' Brief to the Second Circuit, November 12, 1991, at 35 (emphasis added)). If, as Petitioners stated, they failed to argue their "fraud on the court" theory on the initial appeal, the issue was waived. *See New York City Unemployed & Welfare Council* v. *Brezenoff*, 742 F.2d 718, 724 n.3 (2d Cir. 1984); *Northwestern Indiana Tel. Co.* v. *FCC*,

872 F.2d 465, 470 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990).

CONCLUSION

For all the foregoing reasons, the Petition should be denied.

Dated: June 8, 1992

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT RULES RELATING TO THE ORGANIZATION OF THE COURT § 0.23

§ 0.23 Dispositions in Open Court or by Summary Order

The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.